

NEW YORK CITY BOARD OF STANDARDS AND APPEALS

Queens Neighborhoods United et al,

Appellants

Appeal from Decision of Department of Buildings,
September 20, 2018

BSA Cal. No. 2018-166A

Concerning 40-31 82nd Street aka 40-19 82nd Street, Elmhurst;
Queens Block 1493 Lot 15

REVISED STATEMENT OF FACTS AND LAW

BACKGROUND	1
RELEVANT ZONING PROVISIONS	11
ARGUMENT	17
I. DOB’s Issuance of a Permit for a Building To Contain a Large Retail Store in a C1 Zoning District Violates ZR §§ 31-00, 31-11 and 32-15	17
II. Respondents Cannot Avoid Controlling Law by Hiding Their Nonconforming Use in a Cellar	23
III. The Attempt by Target and Developers to Circumvent Zoning at the Property Reflects a Citywide Pattern and Practice	26
LIST OF EXHIBITS	29

BACKGROUND

40-31 82nd Street (aka 40-19 82nd Street; Queens Block: 1493 Lot: 15) in Elmhurst, Queens (the “Property”) is in a residential district which allows only small-scale retail stores that

provide for the needs of local consumers. The BSA must overturn the unlawful issuance of a permit for the development of a large-scale destination retail mall at the Property. *See* Exhibit B.

The Property is located in a thriving residential area with many small shops that are run by residents and serve neighborhood needs. Since the enactment of the 1961 Zoning Resolution, the Property has been zoned R6 with a C1-3 overlay. Exhibit RR. Retail uses on such properties are restricted to those in Use Group 6. ZR § 32-00, Exhibit VV. Use Group 6 only allows stores that serve “local consumer needs” and have a “small service area.” ZR § 32-15, Exhibit A.

The Developer Respondents purchased the property in 2016, *see* Exhibit SS (Deed), and subsequently attempted to change the zoning so that more intensive retail could be located in a new building they planned to build. Their attempt to make this change via the legislative process failed. Simultaneous with that effort, Respondents initiated an application for a building to house a “commercial destination” - a mall anchored by a large 23,580 square foot Target department store. The proposed store is more than twice the maximum size allowed under the applicable C1 zoning.

Such destination retail would have been permitted if the attempted rezoning had been approved. Yet even though it was not, the New York City Department of Buildings (“DOB”) granted the Developers’ a permit to build for a non-conforming use. Exhibit B. DOB did so based on the Developers’ argument that cellar space was not to be counted toward the limit of 10,000 square feet per establishment applicable to Variety Stores in this location -- an argument based on zoning text dealing with density, bulk and parking requirements, not with uses and the allowable size of individual “establishments.” The Developers’ interpretation of the zoning text would

provide a loophole through which the store would fit, leading to an absurd result that contradicts both the language and the intent of the statute.

Therefore, the BSA should annul the September 20, 2018 permit, as requested by Queens Neighborhoods United (“QNU”) and its members. QNU is an unincorporated association of residents and business owners in Corona, Elmhurst, and Jackson Heights areas of Queens fighting displacement and criminalization. QNU has members who live immediately adjacent to, or within a few hundred feet of, the proposed new building, and who would be directly affected by its violations of the Zoning Resolution. Individual appellants live, work and/or have businesses near the proposed development. All actively and successfully protested the application to change the zoning of the Property because they anticipate that the change in permitted uses of buildings in the area will lead to rents going up for small businesses that serve the community now. All will be harmed by such a change because they will lose access to jobs and livelihoods, healthy food, community cohesion and affordable life staples.

The Developers purchased the Property, a former movie theater, in September 2016 with the intention of “transforming the area to bring in more well-known tenants.” As reported in *Sun Equity, Heskell Group Pay \$27M for Jackson Heights Site; Buyers Plan 160K sf Commercial Building in Place of Ex-Cinema*, M. Hall, *The Real Deal* (Sept. 21, 2016), Exhibit C, and on the Developers’ website,¹ the plans were for a 10-story building with commercial space on the ground floor, a community facility on the second floor, and residential space above.

On March 31, 2017, Target recorded a Memorandum of Lease in the New York City Automated City Register Information System, Exhibit D. The Memorandum of Lease states that

¹ This proposal was subsequently removed from the Developers’ website.

the lease is for a 15-year lease of “approximately 23,580 square feet of space” in the Property and prohibits many of the normal neighborhood uses, such as laundry services, smaller clothing retail, drug stores, variety stores and grocery stores, all of which are permitted in Use Group 6 and many of which are the types of businesses that employ, or are owned by QNU Members and individual appellants , from sharing space in the Property. Not only does Developer intend to replace local neighborhood retail with a regional destination but the Memorandum of Lease in fact prohibits exactly the kinds of businesses that the Zoning Resolution expressly seeks to permit in a C1 district.

Eight months after announcing their plan to build a 10-story residential building building with commercial and community space on the lower floors, and two months after signing the lease with Target, on May 24, 2017, the Developers abandoned the residential tower portion of the project and applied for a permit to build a 2-story commercial building. *See Job Overview. Exhibit E.* New renderings were released to the press showing this building. *See Target to Open at Former Jackson Heights Cinema Site*, K. Honan, DNAInfo (May 1, 2017). Exhibit E. The entire building was proposed to be dedicated to retail. There was no mention of the 10-story, mostly residential, building that the Developers had publicized the previous September.

Some time before January 25, 2018, the Developers initiated a Uniform Land Use Review Procedure (“ULURP”) to change the zoning of the Property from R6/C1-3, **a residential designation with an overlay for local commercial uses**, to C4-5X, a commercial designation that would have allowed the Property to be developed as a regional destination for shoppers from

outside the neighborhood.² *See, e.g., 82nd Street Rezoning, Environmental Assessment Statement* (Jan. 25, 2018), Exhibit G (key pages, herein “EAS”).

The City Planning Commission Report on the rezoning characterized the existing zoning as follows: “The C1-3 commercial overlay district is mapped in conjunction with residential zones along neighborhood shopping streets to support local retail and service needs.” CPC Report, *Cal. No. 1 C 180098 ZMQ* (July 9, 2018), Exhibit H. The documents the Developers submitted in support of their ULURP application also admitted that the current zoning only allows “local retail,” and would not allow the Target store for which they had signed a Memorandum of Lease. *See, e.g., EAS* at 10.

Nora Martins of Akerman LLP, representing the Developers at the CPC hearing, stated publicly that the Developers intended to create a commercial “destination” that attracts shoppers from the “region” and outside the immediate neighborhood. *See City Planning Commission Hearing Video* (May 23, 2018).³

QNU has been opposing the Developers’ plan from the outset. The Developers presented their rezoning plan to a public meeting of Queens Community Board 4 on March 13, 2018. At that public hearing, more than 100 local residents offered testimony against the proposed change in the commercial designation that would allow the property to be used for a regional shopping area with big box stores and national chains. At that hearing, twenty-four members of

² ULURP requires presentations to the local community board and the borough president, who can provide advice to to the City Planning Commission (CPC) and Council Member about whether or not to approve a particular zoning change. The CPC and the City Council must then each vote to approve before the change becomes law. The Mayor has the opportunity to veto a change after the CPC and Council approve. If he does not, the change becomes a binding part of the Zoning Resolution. The process requires a series of pre-application meetings with the Department of City Planning, which are followed by an environmental review pursuant to CEQR.

³ Available at <https://youtu.be/bilpapxTU2s>.

Community Board 4 voted to oppose the application; none voted to support; four abstained. On May 9, 2018, Borough President Melinda Katz recommended that the project be approved, with conditions meant to mitigate the impact of the large commercial development on the neighborhood. Thereafter, the CPC held a hearing about the project on May 23, 2018. Developers' counsel acknowledged during the presentation that the change her clients sought would be to a "regional commercial center designation," but sought to justify the appropriateness of changing the zoning designation by arguing that "this is not just a local shopping area serving local retail needs, though it is *very much that*; it also draws customers from a larger area." Ms. Martins cited the mission of the local business improvement district of marketing the area as a "destination" as a further justification. *CPC Hearing Video* (May 23, 2018).⁴ Describing the need for additional parking, Ms. Martins confirmed that the new building, with its commercial uses including a Target "Express" location, was intended to be a "regional retail" draw. *Id.* at 1:03. The Developers' website similarly describes this development, a.k.a. "The Shoppes," as "A rare outdoor mall experience in the outer boroughs."

At the CPC hearing, residents and business owners particularly objected to the Target lease. *See Cal. No. 1 C 180098 ZMQ* (July 9, 2018), Exhibit H, at 10-11. At the Review session held by the CPC on June 11, 2018, Commissioner Anna Levin characterized the proposal as a "doubling of the commercial density." *See CPC Review Session Video*, June 11, 2018.⁵ She followed by saying, "This seems a steep price to pay for 24 affordable units." *Id.*

⁴ *See* <https://www.youtube.com/watch?v=bilpapxTU2s>, at 54:00 et seq.

⁵ *See* <https://www.youtube.com/watch?v=84f-TDJ-bd0> at 3:03.

On May 31, 2018, Developers submitted comprehensive plans to DOB for the two-story commercial building with an anchor tenant occupying a space much larger than 10,000 square feet. Exhibit TT.

Subsequently, on July 9, 2018, the CPC voted to approve the MIH rezoning of the Property that would change the commercial and residential rules for the Property, if approved by the City Council. *See Cal. No. 1 C 180098 ZMQ* (July 9, 2018), Exhibit H; *CPC Report, Cal. No. 2, C 180099 ZRQ* (July 9, 2018), Exhibit I.

On June 15, 2018, DOB approved the application filed a year earlier by the Developers for a permit to build a 2-story retail-only building under the current zoning on the basis of the May 31 submission..

Thereafter, in or about July 2018, Council Member Francisco Moya, who represents this area, indicated that he planned to vote against the rezoning proposal in the City Council. A local blog called QNS reported: “‘After conversations with Council member Moya and Assembly member Espinal, and taking the borough president’s recommendations into consideration, we have decided to no longer pursue this rezoning application. We are continuing with construction as permitted under the current zoning,’ said Hank Sheinkopf, a spokesman for the developers of the project, known as the Shoppes at 82nd Street.” *Controversial 82nd Street rezoning halted after local lawmakers voice opposition to developers*, J. Bagcal, QNS (July 16, 2018), Exhibit J. Renderings shared with the press showed that the Developers would go forward with the two-story commercial building that they had applied to build a year earlier, and that they did not intend to build even the smaller residential tower that would have included market rate housing. *Id.*

In addition to the commercial upzoning, the Developers' application would also have permitted a larger residential tower than the one proposed after they first purchased the Property in September 2016. However, the history of this project suggests that the commercial rezoning was the primary, and perhaps the only, reason for this ULURP application, and that the proposals for a residential tower were window dressing from the start. After initially proposing a residential tower in September 2016, in May 2017 the Developers submitted an application for a commercial building without the residential tower. Then, in January 2018, they commenced the ULURP proceeding for a proposal that included a larger version of the residential tower. After withdrawing their rezoning application, the Developers returned to the two-story building design that is now under construction.

That larger tower was to be developed under Mayor de Blasio's Mandatory Inclusionary Housing ("MIH") Program. Although the rezoning would have allowed a slightly taller residential tower than the one proposed in September 2016, that taller tower would have netted the Developers little additional profit, because under the MIH program 36 of the 43 additional apartments would have been income- and rent-restricted. *See generally* EAS, Exhibit G; CPC Report, Cal. No. 1, C 180098 ZMQ (July 9, 2018), Exhibit H; CPC Report, Cal. No. 2, C 180099 ZRQ (July 9, 2018), Exhibit I. The MIH program is designed so that developers neither make or lose money on those restricted units. The application was a successful strategy to get the Mayor to champion the rezoning, which he did at the Queens Town Hall. *See Video of Queens Town Hall* (March 30, 2018).⁶

⁶ *See* https://www.youtube.com/watch?time_continue=7036&v=6IL2jYZi_n0, at 1:56:55. In response to a question about the proposed rezoning of the Property at the Town Hall, Mayor Bill de Blasio said, "If you've got a site where there's no affordable housing, that's as I understand it the current rule would be that there would be no affordability whatsoever, our plan allows for

While the ULURP process unfolded, Developers continued to work with DOB on the applications they filed in May 2017 for a 2-story commercial building. On June 28, 2018, DOB approved their Zoning Diagram, Exhibit K, triggering the start of the 30-day Public Challenge Period. *See* 1 RCNY § 101-15. A realtor representing the owners of the property published materials that clearly show the intended use of the cellar as space for a large retail tenant. Exhibit L.

On or about August 11, 2018, some of the present Petitioners timely filed zoning challenges arguing that the proposed use of the building for a large store such as Target was not allowed in the zoning district. ZRD Zoning Challenge with response, Exhibit M. On August 29, DOB accepted our Zoning Challenges, stating “Zoning Challenge regarding Use Group 6 Accepted.” *Id.* Initial Challenge review by DOB resulted in a Stop Work Order (“SWO”). Exhibit N. A Notice of Objections, dated August 29, 2018 explained that the violation was that “first floor commercial retail calculated without counting cellar commercial retail ... is already up to 18,706 sf, which is way over the maximum permitted in the C1-3 District of allowed 10,000 sf, and by which of such first floor commercial retail under use group 6 is contrary to Section 32-15 ZR.” Exhibit O. On September 5, DOB issued a Notice of Violation for work ongoing at the Property despite the SWO. Exhibit P; citing RCNY §28-104.2.10 (Revocation of approval) and RCNY §28-105.10.1 (Notice of proposed revocation), *see* Exhibit W.

affordability on the site. We are interested in creating affordable housing anywhere we can get it so that one's still being talked through, but I have to be very clear, when we have a chance to build affordable housing - which means that community members will be there longterm, that's very very important, as opposed to a place, again, talk to the 20 families who will have those units and that means they will have affordable housing for a decade, which is a very very big deal for them - and I think it's going to be more than 20, but that's something that still going through a community process.”

On September 10, 2018, developers filed new plans for the Property that were substantially the same as the initial May 2017 plans and did not cure the central defect: the planned use of the building violates the underlying zoning by including a 23,580 square-foot destination store. Exhibit Q (these plans differed from the May 31 submission in the layout of the ground floor and the planned use for the second floor; neither change resolved the central issue).

On September 13, DOB updated its Building Information system to indicate say,

BORO COMMISSIONER HAS ISSUED SWO FOR ALL WORK
UNDER # 421485805 DUE TO INTENT TO REVOKE APPROVAL
AND PERMIT. Exhibit R.

It also mailed another Notice of Violation to the Developer. Exhibit S; citing RCNY § 28-207.2 (Stop Work Orders), *see* Exhibit W. Confusingly also on September 13th, DOB wrote a letter to the Developers stating that their “response sufficiently demonstrates that the approval and permit should not be revoked.” Exhibit T. On September 17, 2018, DOB rescinded the SWO. Exhibit U. On September 20, 2018, the DOB issued a new permit for construction of the two story commercial building with over 22,000 square feet for a retail tenant in the cellar. Exhibit B. Realtor’s materials that were, upon information and belief, updated right after the September 20 permit was issued, confirm that the intended tenant is Target. Exhibit V.

Interpreting the rescinding of the SWO as denial of their zoning challenges, Petitioners submitted an Appeal of Challenge Denial on October 2, within 15 calendar days of the denial as required by City Rules. Exhibit X. The DOB has not yet responded to this Appeal.

Construction at the Property continues apace. A deep hole has been dug, presumably to accommodate the oversized cellar and sub-cellar levels where the Developers intend to hide uses that do not conform to the Property’s zoning. Exhibit Y (photos taken November 16).

RELEVANT ZONING PROVISIONS

(Emphases added)

Article I -- General Provisions

Chapter 1 -- Title, Establishment of Controls and Interpretation of Regulations

11-22 Application of Overlapping Regulations

Whenever any provision of this Resolution and any other provisions of law, whether set forth in this Resolution or in any other law, ordinance or resolution of any kind, [...] contain any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern.

* * * *

Chapter 2 -- Construction of Language and Definitions

12-10

DEFINITIONS

"Floor area" is the sum of the gross areas of the several floors of a #building# or #buildings#, measured from the exterior faces of exterior walls or from the center lines of walls separating two #buildings#. In particular, #floor area# includes:

* * * *

(o) any other floor space not specifically excluded.

However, the #floor area# of a #building# shall not include:

(1) #cellar# space, except where such space is used for dwelling purposes. #Cellar# space used for retailing shall be included for the purpose of calculating requirements for #accessory# off-street parking spaces, #accessory# bicycle parking spaces and #accessory# off-street loading berths; ...

* * * *

Article III -- Commercial District Regulations

Chapter 1 -- Statement of Legislative Intent

31-00 -- GENERAL PURPOSES OF COMMERCIAL DISTRICTS

The Commercial Districts established in this Resolution are designed to promote and protect public health, safety and general welfare. These general goals include, among others, the following specific purposes:

(a) to provide sufficient space, in appropriate locations in proximity to residential areas, for **local retail development catering to the regular shopping needs of the occupants of nearby residences**, with due allowance for the need for a choice of sites;

* * * *

(d) to protect both local retail development and nearby residences against congestion, **particularly in areas where the established pattern is predominantly residential but includes local retail uses on the lower floors, by regulating the intensity of local retail development, by restricting those types of establishments which generate heavy traffic**, and by providing for off-street parking and loading facilities;

* * * *

31-10 -- PURPOSES OF SPECIFIC COMMERCIAL DISTRICTS

31-11 – C1 Local Retail Districts

These districts are designed to provide for local shopping and include a wide range of retail stores and personal service establishments which cater to frequently recurring needs. Since these establishments are required in convenient locations near all residential areas, and since they are relatively unobjectionable to nearby residences, these districts are widely mapped. The district regulations are designed to promote convenient shopping and the stability of retail development by encouraging continuous retail frontage and by prohibiting local service and manufacturing establishments which tend to break such continuity.

31-12 – C2 Local Service Districts

These districts are designed to provide for a wide range of essential local services not involving regular local shopping. Since these establishments are less frequently visited by customers, they tend to break the continuity of prime retail frontage and, therefore, hamper the development of convenient shopping. The permitted services create relatively few objectionable influences for nearby residential areas.

* * * *

31-14 – C4 General Commercial Districts

These districts comprise the City's major and secondary shopping centers, which provide for occasional family shopping needs and for essential services to business establishments over a wide area, and which have a substantial number of large stores generating considerable traffic. The district regulations are designed to promote convenient shopping and the stability of retail development by encouraging continuous retail frontage and by prohibiting service and manufacturing establishments which tend to break up such continuity.

31-15 – C5 Restricted Central Commercial Districts

These districts are designed to provide for office buildings and the great variety of large retail stores and related activities which occupy the prime retail frontage in the central business district, and

which serve the entire metropolitan region. The district regulations also permit a few high-value custom manufacturing establishments which are generally associated with the predominant retail activities, and which depend on personal contacts with persons living all over the region. The district regulations are also designed to provide for continuous retail frontage.

* * * *

Chapter 2 -- Use Regulations

32-00 – GENERAL PROVISIONS

In order to carry out the purposes and provisions of this Resolution, the #uses# of #buildings or other structures# and the open #uses# of #zoning lots#, or portions thereof, have been classified and combined into Use Groups. A brief statement is inserted at the start of each Use Group to describe and clarify the basic characteristics of that Use Group.

* * * *

32-10 – USES PERMITTED AS-OF-RIGHT

* * * *

32-15.– Use Group 6

C1 C2 C4 C5 C6 C8

Use Group 6 consists primarily of retail stores and personal service establishments which:

- (1) provide for a wide variety of local consumer needs; and
- (2) have a small service area and are, therefore, distributed widely throughout the City.

Public service establishments serving small areas are also included. Retail and service establishments are listed in two subgroups, both of which are permitted in all C1 Districts.

The #uses# listed in subgroup A are also permitted within a #large-scale residential development# to provide daily convenience shopping for its residents.

A. Convenience Retail or Service Establishments

Bakeries, provided that **#floor area# used for production shall be limited to 750 square feet per establishment**

Barber shops

Beauty parlors

Drug stores

Dry cleaning or clothes pressing establishments or receiving stations dealing directly with ultimate consumers, **limited to 2,000 square feet of #floor area# per establishment, ...**

Eating or drinking establishments

Food stores, including supermarkets, grocery stores, meat markets, or delicatessen stores

Hardware stores

Laundry establishments, hand or automatic self-service
Liquor stores, package
Post offices
Shoe or hat repair shops
Stationery stores
Tailor or dressmaking shops, custom
Variety stores, **limited to 10,000 square feet of #floor area# per establishment**

B. Offices

Offices, business, professional including ambulatory diagnostic or treatment health care, or governmental
Veterinary medicine for small animals

C. Retail or Service Establishments

Antique stores
Art galleries, commercial
Artists' supply stores
Automobile supply stores, with no installation or repair services
Banks, including drive-in banks
Bicycle sales
Book stores
Candy or ice cream stores
Carpet, rug, linoleum or other floor covering stores, **limited to 10,000 square feet of #floor area# per establishment**
Cigar or tobacco stores
Clothing or clothing accessory stores, **limited to 10,000 square feet of #floor area# per establishment**
Clothing rental establishments, **limited to 10,000 square feet of #floor area# per establishment**
Docks for ferries ...
Docks for water taxis ...
Docks or mooring facilities for non-commercial pleasure boats
Dry goods or fabrics stores, **limited to 10,000 square feet of #floor area# per establishment**
Eating or drinking establishments with entertainment, but not dancing, with a capacity of 200 persons or fewer
Eating or drinking establishments with musical entertainment but not dancing, with a capacity of 200 persons or fewer
Electrolysis studios
Fishing tackle or equipment, rental or sales
Florist shops
Frozen food lockers
Furniture stores, **limited to 10,000 square feet of #floor area# per establishment**
Furrier shops, custom
Gift shops

Interior decorating establishments, provided that #floor area# used for processing, servicing or repairs shall be limited to **750 square feet per establishment**

Jewelry or art metal craft shops

Leather goods or luggage stores

Loan offices

Locksmith shops

Medical or orthopedic appliance stores

Meeting halls

Millinery shops

Music stores

Newsstands, open or enclosed

Optician or optometrist establishments

Paint stores

Pet shops

Photographic equipment or supply stores

Photographic studios

Picture framing shops

Record stores

Seed or garden supply stores

Sewing machine stores, selling household machines only

Shoe stores

Sporting or athletic stores

Stamp or coin stores

Telegraph offices

Television, radio, phonograph or household appliance stores, **limited to 10,000 square feet of #floor area# per establishment**

Toy stores

Travel bureaus

Typewriter stores

Wallpaper stores

Watch or clock stores or repair shops

* * * *

32-19 – Use Group 10

C4 C5 C6 C8

Use Group 10 consists primarily of large retail establishments (such as department stores) that:

(1) serve a wide area, ranging from a community to the whole metropolitan area, and are, therefore, appropriate in secondary, major or central shopping areas; and

(2) are not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic.

A. Retail or Service Establishments

Carpet, rug, linoleum or other floor covering stores, with **no limitation on #floor area# per establishment**

Clothing or clothing accessory stores, **with no limitation on #floor area# per establishment**

Department stores

Depositories for storage of office records, microfilm or computer tapes, or for data processing

Docks for ferries . . .

Dry goods or fabric stores, with no limitation on #floor area# per establishment

Eating or drinking places, without restrictions on entertainment or dancing, but limited to location in hotels

Furniture stores, with no limitation on #floor area# per establishment

Office or business machine stores, sales or rental

Photographic or motion picture production studios

Radio or television studios

Television, radio, phonograph or household appliance stores, **with no limitation on #floor area# per establishment**

Variety stores, **with no limitation on #floor area# per establishment**

B. Wholesale Establishments

Wholesale offices or showrooms, with storage restricted to samples

ARGUMENT

I. DOB's Issuance of a Permit for a Building To Contain a Large Retail Store in a C1 Zoning District Violates ZR §§ 31-00, 31-11 and 32-15

“When interpreting a statute, ‘our primary consideration is to discern and give effect to the Legislature's intention.’ . . . The text of a statute is the ‘clearest indicator’ of such legislative intent and ‘courts should construe unambiguous language to give effect to its plain meaning.’ . . . We have also previously instructed that ‘[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.’ . . . Furthermore, ‘a statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other.’” *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017) (citations omitted). It should be noted, too, that even unambiguous statutory language “will not be read literally where such a reading would lead to “an absurd result that would frustrate the statutory purpose.” *Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420-422 (1990); *see also Matter of Jamie J.*, 30 N.Y.3d 275, 283-84 (2017) (citations omitted) (rejecting a “hyperliteral reading of [the statute], divorced from all context,” and stating that “courts should not adopt ‘vacuum-like’ readings of statutes in ‘isolation with absolute literalness’ if such interpretation is ‘contrary to the purpose and intent of the underlying statutory scheme and would conflict with other operative features of the statute's core overview procedures’”).

As the First Department wrote in *City v. Stringfellow's of New York*, 253 A.D.2d 110, 115-116 (1999), *aff'd*, 96 N.Y.2d 51 (2001), Exhibit Z, “While zoning ordinances must be narrowly interpreted and ambiguities are to be construed against the zoning authority, . . . the fundamental rule in construing any statute, or in this case an amendment to the City's Zoning Resolution, is to

ascertain and give effect to the intention of the legislative body, here the New York City Council.” The standard for interpreting the zoning resolution was recently reaffirmed by the First Department Appellate Division in *Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 2018 NY Slip Op. 06870 (1st Dept. Oct. 16, 2018), Exhibit AA. The court there relied on the “clear and unambiguous language” of the Resolution, as opposed to how the language of the Zoning Resolution “could be read,” *id.* at 5-6, to overturn a decision of the BSA that misinterpreted the Resolution’s definition of “open space” in permitting construction of a building despite a lack of required open space.

The Zoning Resolution itself provides further guidance about how it is to be read where we find multiple “restrictions covering any of the same subject matter[:.]” “the provision which is more restrictive or imposes higher standards or requirements shall govern.” ZR § 11-22, Exhibit BB.

It is the responsibility of the Department to evaluate not only the design of a proposed building, but also its use. *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 10 N.Y. 3d 264 (2008), Exhibit CC; N.Y. City Charter § 643, Exhibit DD. The Property at issue is located in a C1 district. C1 is titled “Local Retail Districts.” ZR § 32-11. Such districts are located “in convenient locations near all residential areas,” and “are designed to provide for local shopping and include a wide range of retail stores and personal service establishments which cater to frequently recurring needs.” *Id.* Retail establishments in C1 districts are limited to those that serve “local consumer needs” and have a “small service area.” ZR § 32-15.

The permitted establishments are enumerated in ZR § 32-15, titled “Use Group 6.” They are comprised of typical neighborhood shops that are usually quite small, such as bakeries, beauty parlors, hardware stores and drug stores. As to these, the Zoning Resolution does not

specify their size. As the Queens County Supreme Court affirmed in *Coalition for Community Preservation v. BSA and Home Depot, Inc.* 14997/94 (June 6, 1995), Exhibit EE, the DOB Can rightfully grant a permit for developing a bespoke property for one of these unrestricted retail uses in Use Group 6 no matter the size of the planned establishment.

On the other hand, Use Group 6 includes a few uses that can be developed at various scales, but with respect to those, it specifies that they must be below 10,000 square feet per establishment to fit into Use Group 6. “Variety stores are among those; they are “limited to 10,000 square feet of #floor area# per establishment” ZR § 32-15.

The small size limits of the local retail stores allowed in C1 districts and listed in Use Group 6 contrast with the large-scale stores allowed in C4, “General Commercial Districts,” and C5, “Restricted Commercial Districts,” which are listed in Use Group 10. C4 districts “comprise the City's major and secondary shopping centers, which provide for occasional family shopping needs and for essential services to business establishments over a wide area, and which have a substantial number of large stores generating considerable traffic.” ZR § 31-14. C5 districts contain “the great variety of large retail stores and related activities which occupy the prime retail frontage in the central business district, and which serve the entire metropolitan region.” ZR § 31-15.

The Zoning Resolution describes these larger stores as follows:

Use Group 10 consists primarily of large retail establishments (such as department stores) that:

- (1) serve a wide area, ranging from a community to the whole metropolitan area, and are, therefore, appropriate in secondary, major or central shopping areas; and
- (2) are not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic.

ZR § 32-19.

Several types of establishments that are size limited in Use Group 6 are also found in Use Group 10 with no size restriction, including Department Stores and Variety Stores. The smaller versions of these stores serve the purposes of C1 districts, whereas the larger versions serve the purposes of C4 and C5 districts.

It is noteworthy that in the *Home Depot* case mentioned above the BSA concluded that the large hardware store could be described as either Use Group 6 or 10 when it affirmed the permit for the development; the zoning district of the property where the store planned to locate permitted both uses (C-8) so the BSA did not need to resolve which one fit best. *BSA Cal. No. 74-93-A, Exhibit FF*. The Property that is the subject of the present disputed is zoned for C-1 commercial uses; here, Use Group 6 is permitted while Use Group 10 is prohibited. The distinction which made no difference in the evaluation of the *Home Depot* matter is at the heart of the present controversy. The difference is in the underlying zoning. Unlike in *Home Depot*, the zoning here is designed to protect a residential neighborhood.

The legislative history further illuminates how the Zoning Resolution carefully guards the difference between districts zoned for large retail establishments and those restricted to only smaller stores. Prior to the 1961 adoption of the present Zoning Resolution, the City commissioned two studies, each of which included proposed zoning resolutions: *The Plan for Rezoning the City of New York* by Harrison Ballard & Allen (1950) (“the 1950 Proposal”), Exhibit GG, and *Zoning New York City*, by Voorhees Walker Smith & Smith (1958) (“the 1958 Proposal”), Exhibit HH. Both of these foundations of the current Zoning Resolution highlight the distinction

between the kinds of districts where “destination retail” is permitted and those where only small-scale local retail is permitted.

The 1950 Proposal highlighted the pioneering of “chain store enterprises” and the trend toward the concentration of retail. 1950 Proposal, Exhibit GG at 31. Its proposed zoning resolution drew a sharp distinction between “RESIDENCE RETAIL DISTRICTS,” described as part of its “Article 2: Residence and Associated Districts,” and “COMMERCIAL DISTRICTS,” which are described in their own distinct Article 3. Residence Retail Districts were proposed to be mapped

to protect *residences*, so far as possible in areas where the established pattern is predominately *residential*, but includes retail development on the ground floor, ...to protect both *residential* and retail development against congestion... by regulating the intensity of retail development... [and] to provide sufficient space, in appropriate locations in close proximity to *residences*, for retail development catering to most of the regular shopping needs of the occupants of such *residences*.

Id. at 146 (emphasis in original). In contrast, Commercial Districts were proposed to “provide sufficient space in appropriate locations for transaction of all types of commercial and miscellaneous service activities in beneficial relation to one another, and thus strengthen the economic base of the community and to protect public convenience, prosperity and welfare.” *Id.* at 161.

The 1950 Proposal classifies Variety Stores as part of Use Group 6, at 243, which “consists primarily of those uses which are needed for more or less daily shopping by persons residing nearby, and therefore serve an area with a smaller population than [other retail and commercial use groups,” at 174. Use Group 6 was proposed to be allowed in “Residence Retail Districts” and all “Commercial Districts.” By contrast, department stores were part of Use Group 9, which “consists primarily of those retail uses which... are used for occasional shopping by persons

residing at a considerable distance, and therefore serve an area ranging from several square miles to the whole metropolitan area.” 1950 Proposal, Exhibit GG, at 175, 242. Use Group 9 was proposed to be prohibited in all Residence Retail Districts but permitted in all Commercial Districts.

The 1958 Proposal also includes detailed discussion of the development of the shopping mall and the “integrated shopping center,” Exhibit HH at 10-11, and distinguishes between districts “designed to serve local area needs - C1 and C2” and districts either “designed for the primary and secondary outlying shopping centers serving extensive service areas - C4” or “catering to the retail and commercial needs of the entire City and metropolitan region - C5 and C6.” *Id.* at 108. The 1958 Proposal clearly spells out why the limits on the size of establishments in C1 areas are there:

Because [C1] districts are closely related to the residential areas they serve, particularly in medium- and high-density areas, it is important to limit the intensity of commercial development to levels which are consistent with the adjoining residential areas. Department stores and other large establishments are therefore not permitted, because they generate excessive pedestrian and vehicular traffic originating outside the immediate residential neighborhood.

Id. at 108-9 (emphasis added). This clearly articulated rationale demonstrates that the Zoning Resolution intended to prohibit large establishments, regardless of whether they are above or below ground. This inference is particularly compelling because the 1958 Proposal already distinguished clearly between Variety Stores at differing scales in precisely the same way as 1961 Zoning Resolution, still in effect today. That Proposal, like the current Zoning Resolution, placed Variety Stores “limited as to floor area” in Use Group 6 and allowing them in C1 and other districts while placing “unlimited” size Variety Stores in Use Group 10, and prohibiting them in C1 districts. *Id.* at 368.

The store Target plans to open at the Property is over 22,000 square feet, far above the explicit “10,000 square foot per establishment” limit for Variety Stores in C1 districts contained in ZR 32-15. To add insult to injury, Target’s lease rider for the Property prohibits many of the uses that are permitted in Use Group 6 from sharing space in the development as proposed, explicitly not permitting laundry services, smaller clothing retail, drug stores, variety stores and grocery stores from opening within the “destination it plans to build at 40-19 82nd Street.

II. Respondents Cannot Avoid Controlling Law by Hiding Their Nonconforming Use in a Cellar

Even though the proposed store will have 23,580 square feet, the Developers and Target have argued that it does not violate zoning because it is a Variety Store with under 10,000 square feet, and therefore falls within Use Group 6. This sleight of hand relies on an erroneous interpretation of the definition of “Floor Area.” That definition states:

[T]he #floor area# of a #building# shall not include: (1) #cellar# space, except where such space is used for dwelling purposes.

ZR § 12-10.

The Developers and Target would read this definition as providing that their store can exceed Use Group 6’s limit of 10,000 square feet per establishment, because, according to them, the retail square footage in the cellar does not count as “floor area.” This is a misreading that disregards the plain language of the statute.

The primary function of the concept of “floor area” in the Zoning Resolution is in the calculation of the allowable bulk and density in the various districts. Consistent with this function, the ZR § 12-10 definition states that cellar space other than habitable cellar space does not

count towards “the floor area of a building,” *i.e.*, that it does not count towards the total square footage available for development within the FAR limit of the district.

However, in the context of use restrictions, the relevant concept is not bulk, but size, measured in terms of the floor area of an establishment. Consistent with this different context and different function, the size limit in Use Group 6 is phrased in terms of “square feet of floor area per establishment,” without reference to its location in the building. ZR § 32-15. This difference in language between the two provisions is not accidental, and must be given meaning. *Avella*, 29 N.Y.3d at 434 (citations omitted) (“[I]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided.”), Exhibit JJ.

Bulk regulations and use regulations for Commercial Districts are even controlled by different chapters of the Zoning Resolution. Bulk is addressed in Chapters 3 through 5 of the Commercial District Regulations (Article III), whereas *use* is addressed in Chapter 2. “[A] statute . . . must be construed as a whole and . . . its various sections must be considered together and with reference to each other.” *Id.* When this is done, it is plain that “floor area per establishment” as used in chapter 2 is calculated differently from “floor area of a building,” as used in chapters 3 through 5 and in the many other places in the Zoning Resolution that deal with bulk.⁷

⁷A separate chapter of the Commercial District Regulations, Chapter 6, addresses accessory off-street parking. This subject, too, is addressed in the definition of “floor area of a building” in ZR § 12-10. It states: “#Cellar# space used for retailing shall be included [*i.e.*, counted as floor area of a building] for the purpose of calculating requirements for #accessory# off-street parking spaces, #accessory# bicycle parking spaces and #accessory# off-street loading berths.” Chapter 6 of Article III of the Zoning Resolution requires developers to provide parking space in proportion to the square footage of commercial space they build. ZR § 36-21. The explicit statement that retail space, whether located in the cellar or elsewhere, shall be counted in calculating the amount of required parking is intended to ensure that the requisite number of parking spaces are provided regardless of the location of retail space within a building. The provision on the calculation of floor

The Developers' interpretation of the size restriction of ZR § 32-15 would lead to an absurd result that would frustrate the statutory purpose of having a specific district reserved for local retail only. Under their interpretation, retail stores of any size would be permitted in a local retail district as long as they were below ground. It is absurd to suggest that these clear distinctions pertaining to use can be vitiated simply by putting a business in the cellar. The 10,000 square foot floor area restriction on stores in C1 applies whether or not the area is in the cellar because it is intended to regulate the size of the store, not the extent of the building's imposition on the neighborhood's residential density, light and air.

That cellar retail space is to be included in calculating the square footage per establishment is confirmed by two Special Permit applications for premises at 462 Broadway in SoHo. One was to allow retail in a district where ground-floor retail is not permitted. A second accompanying application was to allow retail in excess of 10,000 square feet per establishment. The large retail store would have included 16,567 square feet of cellar space. *CPC Reports C170192 and C170193 ZSM* (July 12, 2017), Exhibit KK. The 34 Community Board members voting on this application unanimously "recommend[ed] denial unless the total area for any single retail store, including cellar space, does not exceed 10,000 square feet." *Id.* Borough President Gale Brewer also recommended denial of the applications. Following approval of both applications by the CPC, only the one to allow retail was approved by the City Council. *NYC City Council Res. 1646-2017* (approved Sept. 7, 2017), Exhibit LL. As happened in this case, the second application,

area in relation to parking has nothing to do with the Use Group 6 limitations on the size of establishments, which are regulated by a different chapter of the Commercial District Regulations.

which was to allow a retail store in excess of 10,000 square feet, was withdrawn by the applicant before it could be voted on by the City Council.⁸

III. The Attempt by Target and Developers to Circumvent Zoning at the Property Reflects a Citywide Pattern and Practice

A typical Target Department Store is approximately 135,000 square feet. In 2016, Target announced a national strategy to access urban markets via Target Express Stores, each of which is approximately 22,500 square feet. The fact that there are even larger stores elsewhere in Target's portfolio does not excuse this store's violation of zoning. Target cannot hide behind its "Express" label to avoid the restriction on the Property.

In fact, the Temporary Certificate of Occupancy for the first Target Express location to open in New York City, which opened in July 2016 at the launch of Target's "Express" strategy, properly classifies it as a "VARIETY STORE" in Use Group 10A.⁹ Exhibit MM. That store is within the Forest Hills Special District in a location where the zoning was amended through ULURP specifically to allow Use Group 10 Department Stores. ZR § 86-12, Exhibit NN. Without that legislative action to modify the underlying C2 zoning, the Target Express store there would not have been permitted.¹⁰ This store is smaller than the store proposed for the Property; according to Target's corporate materials it is a "two-level, 21,000-square-foot space."¹¹

⁸ See <https://zap.planning.nyc.gov/projects/P2015M0195> (NYC Dept. of City Planning ZAP Search, 462 Broadway).

⁹ There are several tenants in the building but Target is the major tenant. Eddie Bauer and Men's Wearhouse, two neighboring large retail establishments, are on a different tax lot and not covered by this Temporary Certificate of Occupancy.

¹⁰ C2 districts allow only "essential local services not involving regular local shopping." ZR § 31-12.

¹¹ See <https://corporate.target.com/about/shopping-experience/New-York-market>

These events stand in stark contrast to what happened here: the Developers and Target sought a rezoning to accommodate their oversize store, but like at 462 Broadway and unlike in Forest Hills, here the Developers saw the handwriting on the wall and withdrew their ULURP application before the City Council could vote on it.

While most Target locations in the City are in zoning districts that allow destination retail, it appears that in the last year Target has twice circumvented local retail zoning district protections, and appears poised to continue to do so. Target's landlords have improperly obtained Temporary Certificates of Occupancy, which are granted with little scrutiny, for Target's "Express" establishments as Variety Stores in Use Group 6 on Manhattan's Lower East Side:

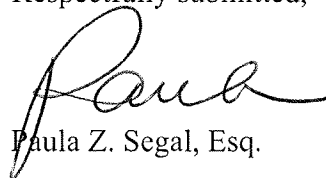
- The Target location at 400 Grand St, a.k.a. 145 Clinton St a.k.a. "Essex Crossing," Manhattan Block 346 Lot 40, opened on August 15, 2018 in a residential district where only C2 "local service" is allowed. Like in Forest Hills, properties with this Zoning Designation are not allowed to be used as locations for Use Group 10 establishments. Unlike in the Forest Hills Special District, the zoning was not modified to allow this store. The C2 district itself was only established in 2012 to allow for a limited amount of commercial use of the redeveloped Essex Crossing. See CPC Report, Cal. No. 7, C 120226 ZMM (August 22, 2012), Exhibit OO. Prior to 2012, this property was zoned solely for residential uses. The current Temporary Certificate of Occupancy, #121186938T007, identifies the ground-floor Target Store as Use Group 6. Exhibit PP. It is well over 10,000 square feet, and not located in the cellar.
- The location on 500 E. 14th Street, Manhattan, Block 407 Lot 7503, opened in late July 2018 in a C1 "local retail" district with the same restrictions that apply to this Property. The Temporary Certificate of Occupancy, #121185519T006, identifies the Target Store as Use Group 6. Exhibit QQ. Likewise, it is well over 10,000 square feet.

- Target's corporate website announces that a new Manhattan Upper East Side location will be opening in 2019 at 1201 3rd Ave.. It will be an "Express" store of approximately 22,600 square feet. The zoning district where work is being done to prepare the location is C1-9. *See Exhibit UU* (BIS Job No: 123581301). Retail is restricted to UG6 in all C1 districts, which includes the subject of the present appeal and this new Target location. *See Exhibit VV.*
- Similarly, the website announces a location in Kips Bay in Manhattan opening 2019 at 520 Second Avenue. The store will be approximately 21,000 square feet. The zoning district of the property is C1-8, where as above and at the subject Property, retail uses are restricted to Use Group 6.
- Target's website also lists a new location to open in Hell's Kitchen in 2019 at 615 10th Avenue. The store will be about 29,000 square feet and be located on a lot that is in an R8/C2-5 zoning district with a Special Clinton District overlay which does not change the underlying restrictions on retail uses. C-2 districts limit retail to Use Group 6 as well. *See Exhibit VV.*

This pattern of evasion must not be allowed to overcome the generally applicable zoning law. The Developers' and Target's ruse is not only contrary to the plain language of the Zoning Resolution, but also leads to a result that negates the intent of the legislature. The Developer's wish to profit from a large-scale national retail tenant is not a reason to overcome controlling law.

Thank you for your prompt attention to this urgent matter.

Respectfully submitted,



Paula Z. Segal, Esq.

LIST OF EXHIBITS

<u>Exhibit A:</u>	Use Groups 6 and 10 ZR Sections
<u>Exhibit B:</u>	September 20, 2018 permit
<u>Exhibit C:</u>	<i>Sun Equity, Heskell Group Pay \$27M for Jackson Heights Site; Buyers Plan 160K sf Commercial Building in Place of Ex-Cinema</i> , M. Hall, The Real Deal (Sept. 21, 2016)
<u>Exhibit D:</u>	Target Lease Memo
<u>Exhibit E:</u>	BIS Job Overview
<u>Exhibit F:</u>	<i>Target to Open at Former Jackson Heights Cinema Site</i> , K. Honan, DNAInfo (May 1, 2017)
<u>Exhibit G:</u>	<i>82nd Street Rezoning, Environmental Assessment Statement</i> (Jan. 25, 2018), (key pages)
<u>Exhibit H:</u>	CPC Report, Cal. No. 1 C 180098 ZMQ (July 9, 2018)
<u>Exhibit I:</u>	CPC Report, Cal. No. 2, C 180099 ZRQ (July 9, 2018)
<u>Exhibit J:</u>	<i>Controversial 82nd Street rezoning halted after local lawmakers voice opposition to developers</i> , J. Bagcal, QNS (July 16, 2018)
<u>Exhibit K:</u>	Zoning Diagram
<u>Exhibit L:</u>	Pre-Sept 20 realtor's documents
<u>Exhibit M:</u>	Zoning Challenge
<u>Exhibit N:</u>	Stop Work Order photo
<u>Exhibit O:</u>	Notice of Objections
<u>Exhibit P:</u>	September 5 notice of violation
<u>Exhibit Q:</u>	Plans filed by the developer on September 10, 2018
<u>Exhibit R:</u>	September 13, DOB Building Information System
<u>Exhibit S:</u>	September 13 notice of violation
<u>Exhibit T:</u>	September 13 letter stating "response sufficiently demonstrates that the approval and permit should not be revoked."
<u>Exhibit U:</u>	September 17 STOP WORK RESCIND ORDER
<u>Exhibit V:</u>	Realtors materials updated after Sept 20
<u>Exhibit W:</u>	Admin Code Sections
<u>Exhibit X:</u>	Community Appeal
<u>Exhibit Y:</u>	Photos of construction
<u>Exhibit Z:</u>	<i>City v. Stringfellow's of New York</i> , 253 A.D.2d 110, 115-116 (1999), <i>aff'd</i> , 96 N.Y.2d 51 (2001)

Exhibit AA: *Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 2018 NY Slip Op 06870 (1st Dept. Oct. 16, 2018)

Exhibit BB: ZR § 11-22

Exhibit CC: *9th & 10th Street L.L.C. v. Board of Standards and Appeals of City of New York*, 856 N.Y.S.2d 28 (2008)

Exhibit DD: N.Y.C. Charter § 643

Exhibit EE: *Coalition for Community Preservation v. BSA and Home Depot, Ind.* 14997/94 (June 6, 1995)

Exhibit FF: *BSA Cal. No. 74-93-A*

Exhibit GG: *The Plan for Rezoning the City of New York* by Harrison Ballard & Allen (1950)(key pages)

Exhibit HH: *Zoning New York City*, by Voorhees Walker Smith & Smith (1958)(key pages)

Exhibit II: ZR § 12-10 (“floor area”)

Exhibit JJ: *Avella v. City of New York*, 29 N.Y.3d 425 (2017)

Exhibit KK: *CPC Reports C170192 and C170193 ZSM* (July 12, 2017)

Exhibit LL: *NYC City Council Res. 1646-2017* (approved Sept. 7, 2017)

Exhibit MM: Temporary Certificate of Occupancy for 7000 Austin Street

Exhibit NN: Forest Hills Special District ZR Sections

Exhibit OO: CPC Report, Cal. No. 7, C 120226 ZMM (August 22, 2012)

Exhibit PP: Temporary Certificate of Occupancy for 400 Grand St

Exhibit QQ: Temporary Certificate of Occupancy for 500 E. 14th St

Exhibit RR: Zoning Map

Exhibit SS: Sept 2016 Deed

Exhibit TT: Plans submitted to DOB May 31

Exhibit UU: BIS Job No: 123581301

Exhibit VV: ZR USE GROUPS PERMITTED IN COMMERCIAL DISTRICTS